

Structured Informality
versus “Litigation Lite”:
How to Keep Arbitrations
from Becoming Major
Lawsuits while Reaping the
Benefits of ADR

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Arbitration promises swift and (relatively) inexpensive justice. It does not always deliver.

Lawyers—and most arbitrators are lawyers—are comfortable with the model provided by the judicial system. And too often—through default—both arbitrators and counsel drift into treating arbitration as “Litigation Lite.” Litigation Lite may be cheaper and faster than the version offered by the judicial system because there is less discovery, evidentiary shortcuts speed things up, and a decision-maker selected for expertise (familiarity with a specialized area of law, the industry, and/or the technology at issue) will require less background education and hearing time. Much of the time, however, Litigation Lite is a way of making compromises—albeit reasonable compromises—between efficiency and justice. Truncated discovery, for example, saves money but may encourage concealment and trial by ambush. Evidentiary shortcuts may allow the admission of unreliable evidence. It is the skilled arbitrator’s responsibility to manage such tradeoffs.

There is another approach, however, that endeavors to reap the full benefits of arbitration without compromise, by taking advantage of what I call “structured informality.” Structured informality seeks to more fully exploit, within the framework of traditional arbitration procedures, two key features of alternative dispute resolution (ADR): flexibility and open communication. Structured informality encourages the participants to custom design a dispute resolution process best suited for their particular case, and to streamline that process on the fly by using informal, process-focused communication among the arbitrator and parties to monitor in real time what the parties need to do to present their positions effectively, and what the arbitrator most needs to know to render a fair and fully informed decision.

Below, I will discuss a range of means calculated to simultaneously increase efficiency and improve the fairness and accuracy of decision-making in appropriate cases. These means may not be suited for or advantageous in all cases, but they should at least become part of the ADR participant’s bag of tools. Since the approach calls for parties to collaborate even in the midst of conflict, this can be challenging given the posture in which arbitration typically starts out—where parties involved in a business relationship have recently engaged in efforts to resolve their differences amicably, but without success. In these circumstances, positions harden, parties can become embittered, and tolerance for accommodation is low. Much of the responsibility for building the necessary level of cooperation in such a context must rest with the attorneys for the parties, but the arbitrator must also be proactive, encouraging the parties to engage in process collaboration.

At the outset, each party must frankly consider with its counsel whether a less litigation-like process best serves its interests. ADR proponents often act as though efficient arbitration is invariably in everyone’s interest, but a party might rationally conclude, in a particular dispute, that exhausting the opposition through scorched earth discovery, or keeping the opponent in the dark, can provide a decisive advantage. In my experience, however, parties typically gain little—and at excessive cost—from such approaches.

Arbitration is not the Shangri-La of dispute resolution. The lion will not lie down with the lamb. Parties will not adopt procedures without seeking tactical advantage. Nonetheless, parties commonly do share an interest in controlling expense and reaching a prompt end to the dispute. Sometimes, when they have continuing relations they do not want to disrupt through excessive hostility, they even have a common interest in the mutual perception that their dispute has been handled fairly. Structured informality calls on the parties to engage in substantial consultations with each other, sharpening their understanding of the issues and of their opponent’s positions while—through communication and procedural accommodation—seeking to define processes and approaches that will make the arbitration more efficient.

The enemy of such clarifications is the perceived interest in surprise. The challenge for the attorneys is managing the tension between the limited advantages of ambush and the accommodations needed for an arbitration hearing that maximizes both efficiency and fairness. Often, because the arbitration comes at the end of a process of dispute communication between parties with long-standing relations, the parties have already opened their kimonos. In other instances, concealment until the hearing may not be possible anyway, and may be of limited value—particularly if revelations are mutual.

Structured informality calls for exploiting to the fullest the flexibility arbitration allows. The key elements include finding the appropriate limits to discovery, minimizing the need for written material, customizing the hearing format into phases, and—critically—facilitating an evidentiary process that allows everyone to gauge when the arbitrator has heard enough so further testimony on a particular subject or additional hearing days would be cumulative or unnecessary. The more time spent up front in talks between the parties and with the arbitrator on how the process may be structured (talks that include open discussion of the underlying substance of the dispute), the more likely it is that the parties will be able to make fully meaningful and complete presentations that wind up taking far less hearing time and costing less.

In some cases, particularly where a brief hearing will be sufficient and the stakes are limited, it will be sufficient simply to set the deadlines for defined discovery, provide witness lists and the like, and proceed to hearing. Where the matter is more elaborate—or threatens to become so—some care is needed, and attention to the procedures outlined below may be fruitful.

Limited and Flexible Discovery and Preliminary Proceedings

Since discovery is the largest pre-hearing expense, arbitration commonly works well at optimizing saving resources and providing crucial information. No magic formula for determining how much evidence is enough, and what is really needed to fairly litigate the case, can be stated meaningfully in the abstract. The parties and the arbitrator must explore this in every case anew. Among the possibilities for them to consider, however, are the following.

Limited Initial Discovery

A substantial proportion of initiated arbitrations are resolved by settlement between the parties. Although it is not the arbitrator's role to participate directly in any mediation or settlement process, the parties and the arbitrator can work together to facilitate the process. Often, assessing the relative strength of the parties' positions, and therefore the case's appropriate settlement value, requires discovery, but less-than-complete discovery. The parties should consider whether initial, focused document exchanges and brief (partial) depositions—with the understanding that discovery and depositions can be continued if the case does not settle—may set the stage for further negotiations that may lead to an amicable resolution. These might be akin to the initial disclosures required under the Federal Rules of Civil Procedure.

Phased Proceedings

In many cases, there are interdependent issues that do not require resolution at a single, integrated hearing. Is this the kind of case in which a determination on some issues at some stage of the proceedings may set the stage for a negotiated or mediated resolution without need of further proceedings? Or might the need for a substantial amount of preparation or discovery be obviated depending on the outcome of a prior issue? In traditional bifurcated or trifurcated proceedings, a final determination is made in an initial phase of the

proceedings, and then—either immediately or after a brief recess—the parties proceed to the next phase. Consider whether it may make for more efficient and inexpensive proceedings to divide the hearing into mini-trials, each preceded by discovery limited to matters relevant to that phase. Of course, this may be difficult if the same witnesses will speak to multiple issues.

Preliminary Determinations by the Arbitrator During the Initial Discovery Phase

Other than to resolve discovery disputes, the arbitrator does not commonly consider any of the fruits of discovery until presented with them at the hearing. The parties should consider whether to ask the arbitrator to consider a preliminary evidentiary presentation on a threshold issue, as to which the arbitrator may make either a preliminary or final determination. That determination could either (i) serve as a basis for outside-the-arbitration settlement negotiations between the parties or (ii) guide the parties and the arbitrator in planning the scope of the hearing. This approach bears obvious similarities to bifurcated or trifurcated proceedings, but it embraces somewhat different goals: assisting in reaching settlement and/or helping focus the remaining phases of the proceedings.

Pre-Hearing Motions and Written Materials and Filings

The preparation of written materials (e.g., motions, briefs, expert reports, declarations, witness statements) represents one of the most costly parts of legal representation. One of the goals of structured informality is to minimize the amount of written material required, particularly in the pre-hearing period. Some issues are of such complexity or subtlety as to require written analysis. In most instances, however, there are ways to avoid lengthy writing that offer the parties an equal or superior opportunity to present their views, and that are often more effective for the decision-maker. Even a lengthy oral argument is generally likely to prove less expensive—and more useful to the arbitrator in grasping the parties' positions—than the traditional set of three briefs.

For most matters, the arbitrator can be provided with a letter of no more than one page in length, setting forth the subject of the dispute in simple terms, or perhaps a simple outline, possibly including citations to a few cases. The arbitrator can then conduct a telephonic oral argument, perhaps of more than usual length, to flesh out the issues and the parties' positions. If reference to additional materials is necessary, they can be attached (preferably to e-mails) and highlighted or flagged.

If the arbitrator needs to review cited case law not identified before the hearing, he or she may well be able to do so in a preliminary way at the hearing, then recess the proceeding or take the matter under (non-final) submission. If the parties are also flexible in their availability, the arbitrator can review submitted cases and materials, then reconnect by telephone a few hours later or the next day in the event that he or she has follow-up questions.

If the parties and the arbitrator are not heavily scheduled, matters can be addressed and resolved promptly, even if everything does not take place at one sitting. These same principles and approaches may apply to post-hearing briefing as well.

Full use of information technology is important for these purposes. If the arbitrator and all parties are in front of their computers during a telephonic hearing, relevant documents, cases, and other matters can be exchanged via e-mail, reviewed, and discussed immediately. The same sort of immediate, concurrent access to documents can be facilitated still more effectively through collaborative technologies such as NetMeeting.

Optimizing the Evidentiary Hearing

There are a range of means—some customary, some more innovative—for rendering an arbitration hearing more effective and efficient. The key is focusing on what is genuinely at issue.

Consider whether there are ways the parties—through frank consultation—can identify and focus on the key factual disputes, streamline and stipulate to facts, and agree on modes of procedure or shortcuts regarding the evidence as to the remainder. On significant though likely uncontroverted matters, the parties should consider stipulating to the accuracy of testimony, or simply stipulate to what the witness would say in an offer of proof.

It is useful for the parties and their counsel to decide whether they prefer to save attorney preparation time or hearing time. Not infrequently, a hearing is made more efficient (if less spontaneous) when direct testimony is offered in the form of declarations, subject to live cross-examination. However, the attorney time devoted to preparing written declarations and the like is typically costlier than the time necessary to prepare and present a witness's testimony.

The notorious informality of arbitration hearings dictates that objections relating to formal matters be kept to a minimum, but the parties should keep in mind a few principles:

- An arbitrator's refusal to hear evidence is one of the few grounds for overturning an arbitral award. While some arbitrators are therefore quite reluctant to exclude evidence, others take the view that if an objecting party is willing to bear the risk of opening up a possible ground for post-arbitration review, the arbitrator should simply call them as he or she sees them.
- On the other hand, two factors may dictate a less tolerant attitude. First, although leading questions are not *per se* objectionable in arbitration, a party may fairly suggest to the arbitrator that when key areas of testimony are reached, it would be better for the witness rather than the lawyer to be doing the testifying. Second, even at the risk of excluding testimony, each party should consider objecting, or at least raising the question as to whether the testimony is growing duplicative or cumulative.

Figuring out how much evidence is enough is often the central process challenge in an evidentiary proceeding. The arbitrator and the parties should seek to exploit the flexibility and informality of arbitration to monitor, in real time during the hearing, how much more evidence is needed on a subject. In a judicial proceeding, the judge and jury are black boxes into which the parties are trying to pour information, guided only by facial expression and body language. No one is permitted to ask a juror, "Are you getting my point?" But although it is seldom done, there is no reason the parties should not be allowed to ask the arbitrator that very question.

If you have an arbitrator who has some technical sophistication, and technical matters are in dispute or relevant to the arbitration, see if he or she is open to confirming what he or she understands without someone explaining it further. The arbitrator should be able to tell the parties, without awkwardness on anyone's part, "We can go through these background matters more quickly, because I understand what online video streaming is and how it works." Or he or she should be able to say, "I know the basics of semiconductor manufacture, but it sounds as though a disputed matter requires that I understand more specifically the role of cell libraries, so why don't we explore that in further detail."

If multiple witnesses can address an issue, consider having an aside with the arbitrator and opposing counsel to ask, “Shall we offer more witnesses on this point?” It could be that more testimony will be helpful, because an opposing witness will dispute the point, and corroboration by others will help the arbitrator make a more informed decision. But if the only reason for hearing several witnesses is to make sure the arbitrator is getting the point, consider the possibility that an intelligent arbitrator can get it right the first time, and that you can ask if they have.

This is illustrative of a general approach. Use the informality of arbitration to inquire, or encourage the arbitrator to inquire whether the testimony is going to be contested at all, only through cross-examination, or with opposing witnesses. Is there some way to alter the order of proof to make it easier for the arbitrator to decide when he or she has heard enough and is ready to decide the issue fairly without further testimony?

Commonly, short of bifurcating the case into phases, doing anything fancy to the usual order of presentation of witnesses and subjects is neither necessary nor clarifying. A series of witnesses should be offered in sequence to tell a story, usually—though not always—in chronological order. Since one witness may be addressing multiple fact issues, it is generally not possible to present all the testimony on one issue, then all the testimony on the next issue, and so on. In some cases, however, it may be.

Consider whether claims or issues can be considered separately, or in some focused manner, particularly if the arbitration is expected to be prolonged and complex. Consider too whether, either before or immediately after the evidence is offered on such an issue or claim, it would be helpful for the parties to provide mini-summations of their positions. The opportunity to provide a series of such summations—subject to the arbitrator’s questioning—may be more effective than a post-hearing brief, particularly if no stenographic record is being made of the proceedings.

Arbitrators generally invite pre-hearing briefs from the parties, both to orient themselves to the issues and the expected evidence, and to provide the legal backdrop for the decision. Consider—either by way of inclusion in a brief or as an opening or pre-hearing oral presentation—expressly outlining for the arbitrator the issues to be decided, the points of disputed fact germane to each issue, and the implications for deciding an issue, should the arbitrator decide that factual disputes one way or the other.

The parties should also consider to what extent, through pre-hearing consultations, they may reach agreement on such an issue array. Providing the arbitrator in advance with such a specific roadmap of the arbitration can assist him or her in determining what factual issues are undisputed, collateral, and central to the arbitration. This is key guidance for the arbitrator in understanding what areas may require more or less testimony, and in which areas further probing by the arbitrator may be important.

Conclusion

My approach to effective arbitration should be obvious by now. The process can be fairer, more efficient, and more effective if there is more oral argumentation as opposed to written presentation. This is partly because such presentations offer more opportunity for the kind of interactivity between arbitrator and proponent that clarifies and addresses the open issues in the arbitrator’s mind. The bias in favor of oral argument is also a specific instance of the general principle that the proceedings will prove both more efficient and more effective if the parties are permitted (and encouraged) to take the pulse of the arbitrator in the course of the hearing. Has he or she heard enough about a particular issue? Does the arbitrator feel comfortable with his or

her understanding of a technical issue based on the expert testimony so far? Would it be helpful for the parties to be more explicit about what they wish to prove regarding a particular issue, and who is taking what position regarding the facts on which it turns?

Civil litigation has evolved a peculiar series of rules and controls over the centuries—rules that have their origin in ensuring that opposing parties are given a fair opportunity to make their case, that evidence meets certain standards of reliability, and that the decision-maker maintains his or her impartiality. But in the context of arbitration—and particularly arbitrations where the decision-maker is familiar with and has special expertise regarding the relevant area of law and/or the industry or technology and its practices—there is no reason for the parties not to exploit more fully the flexibility, the openness to communication, and the informality of arbitration. They should seek, with the arbitrator, to custom design structures for decision-making specifically appropriate for their dispute. Doing so requires openness and flexibility on the part of counsel, as well as trust in each other's integrity.

Every case will neither require nor allow for the techniques described in this chapter. However, a more responsive arbitrator can more effectively guide the proceedings if, with the cooperation of the parties, all the participants attempt to understand how the arbitration is unfolding in real time. Such is the goal of the structured informality approach to arbitration.

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