

Arbitration Panel Best Practices: Realizing the Benefits of a Multi-Arbitrator Tribunal

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Multi-arbitrator tribunals offer benefits almost unique in legal proceedings: evidentiary hearings conducted, and case management overseen, by more than one expert decision-maker. But the benefits inherent in such a process can only be fully realized and the cost justified if the members of the tribunal function as a team, with their relations – both internally and as manifested to the parties – characterized by full participation and engagement, collegiality and mutual respect. By so conducting themselves, it is significantly more likely that all parties will receive – and, just as important, believe they have received – a full and fair hearing and that the panel will enter an accurate and complete award which will mark the end of the dispute rather than the beginning of contentious *vacatur* proceedings.

The relations among members of a multi-arbitrator tribunal are implicated in six major areas:²

Selection of the Panel Chair

Although either the parties or an arbitration provider-organization may select the Chair, in private *ad hoc* arbitrations where no organization is involved the task of selecting the third arbitrator, and normally the Chair, falls to the appointed panel members.³ Not only must the

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² A comprehensive discussion of these subjects is contained in the *Intra-Tribunal Relations* chapter of the 3rd Edition of the CCA's BEST PRACTICES GUIDE.

³ In cases administered by the AAA under its Commercial Rules, the new rules (effective October 1, 2013) provide a protocol for identifying third-arbitrator or Chair candidates in the absence of party-agreement. See Rule R-14. Further references to the AAA's Commercial Rules are to those effective October 1, 2013. In cases administered by JAMS, see Rule 7 of its Comprehensive Arbitration Rules (October 1, 2010 edition). Further references to the JAMS rules are to that edition.

panel adopt a protocol for identifying qualified candidates, it must then select an appropriate person to sit as Chair and, in the event of a dispute among the panel as to who should be appointed, how that dispute may be resolved. It is critically important that Chair candidates possess not only the qualities important for any arbitrator⁴ but managerial qualities such as

- the experience and ability to manage – from beginning to end – a case of the type presented
- experience in efficiently managing the discovery necessary to allow the parties to prepare and present their evidence, and in promptly resolving the inevitable discovery disputes
- familiarity with arbitration practice and procedure, applicable arbitration law(s), and the rules (if any) governing the case and the evidentiary principles to be applied
- the ability and disposition to conduct the hearing in a respectful, professional, and efficient manner
- an ability and willingness to lead the panel, rather than dictate to the other two arbitrators, treating them as full and important participants in all aspects of the arbitration, and
- the fortitude and discretion to address problems in the performance of other arbitrators promptly.

Panel members should frankly discuss candidates and, where members are party-appointed (whether neutral or non-neutral) and their appointing party has views that may properly be considered, solicit and give appropriate deference to them.

⁴ For example: thoughtfulness; open-mindedness; fairness; judgment; a calm and judicious temperament; ability to receive and process large amounts of information; ability to communicate well orally and in writing; wisdom gained through meaningful experience; familiarity with the legal principles applicable to the dispute to be arbitrated; punctuality; a commitment to devote the time and attention needed for a reasonably efficient and expeditious resolution of the dispute; the capacity to manage the proceedings with the requisite degree of firmness and come to a decision in a timely manner; the ability and willingness to treat all participants in the arbitration impartially and with courtesy and respect; and, when desired by the parties, experience with the industry or branch of commerce in which the dispute arose.

The Initial Conference Among Panel Members

After the panel is fully constituted, all panel members should meet to discuss – sufficiently prior to the initial preliminary hearing with counsel and the parties to allow the panel to engage in any necessary followup – key issues relating to case management and how members of the panel will interact among themselves. Holding such a conference may obviate problems that may arise during the case. Although in some cases an in-person conference is impractical, an in-person meeting should be held where all panel members reside or work in the same general locale.

In addition to reviewing their respective disclosures to ensure completeness, and getting acquainted with each other where panel members are unfamiliar with each other's backgrounds or experience, subjects for discussion should also include matters that are important to proper functioning of the panel. These include:

- if a Chair has not been designated, unless the case is administered by the AAA under its Commercial Rules (*see, e.g.*, Rule R-14), development of criteria and a protocol for selection⁵
- panel member status (where some arbitrators are party-appointed, are they neutral or non-neutral)
- in *ad hoc* cases administered only by the tribunal, how should party challenges to an arbitrator's continued service be handled
- completeness of pleadings and conflicts check-lists and a schedule for obtaining needed information
- adequacy of the parties' arbitration agreement to handle the dispute or whether modifications should be suggested to the parties at the initial preliminary hearing; in *ad hoc* tribunal-administered cases, whether party-adoption of any "rules" would facilitate the parties' realization of a full and fair hearing and the panel's management of the case

⁵ Where this is the case, the panel might confine its discussion at the initial panel conference to matters involving chair (or third arbitrator) selection and defer the remaining subjects until the tribunal is fully constituted.

- unless the parties' arbitration agreement deals specifically with discovery, general views of panel members on appropriate discovery vehicles and the extent of their use in the case⁶
- in private *ad hoc* arbitrations, how should the panel suggest to the parties that discovery disputes be resolved and who should resolve them⁷
- confirmation of applicable substantive and procedural law, with the parties being asked to reconfirm at the initial preliminary hearing
- general case management
- panel conduct during hearings (punctuality; preparation; when and how additional evidence or legal briefing should be requested)
- arbitrator questioning of witnesses during hearings (always respectful and mindful that the arbitrator should not "take over" the case, but when should arbitrator questioning occur: during counsel's examination, or after counsel have completed their examinations, of a witness)
- protocol for identifying a need for, and communication to the parties of the perceived need for, additional evidence or focused legal briefing (ideally, through the Chair and without attribution to a particular arbitrator)
- whether and to what extent a member of the panel should undertake his or her own independent research on issues (among experienced arbitrators, there is no consensus, but ordinarily the parties should be advised and given an opportunity to comment on research results)

⁶ See AAA Commercial Rule R-22, which expands and clarifies the authority of the arbitrator in setting discovery limits. Discovery in FINRA-administered cases is governed by Rules 12505-511 (customer cases) and 13505-511 (industry cases). In JAMS-administered cases, Rule 17 of its Comprehensive Arbitration Rules provides for minimum discovery by parties but vests the arbitrator with authority to order more for good cause. See also Section 17 of the Revised Uniform Arbitration Act (codified in Washington as RCW 7.04A.170).

⁷ AAA Commercial Rule R-44(b) provides that, in the absence of an objection by a party or another arbitrator, the Chair is vested with the authority to resolve discovery disputes.

- the deliberative process (when should substantive case discussion begin)
- protocols for preparation of orders (generally the Chair prepares routine orders, with appropriate involvement of the entire panel; substantive orders and awards may be prepared by any panel member, but all panel members should be involved)⁸
- a protocol for communicating with the parties (normally, the province of the Chair after input from other tribunal members)
- protocols for handling intra-tribunal disagreements during hearings (best resolved in a panel executive session)
- the Chair's commitment to communicate regularly with other members of the tribunal so all are up to date and informed
- panel commitment to responsiveness, punctuality and full participation and preparation throughout the case, and
- development of an agenda for the initial preliminary hearing.⁹

Some of these topics should be revisited as the case proceeds and, with respect to matters likely to arise during the hearing-on-the-merits, at about that time.

⁸ But note that in cases administered by the AAA under its Commercial Rules, Rule R-44(a) requires that all decisions, except for those regarding discovery (which are delegated to the Chair under Rule R-44(b)), be by majority vote. Section 13 of the Revised Uniform Arbitration Act (adopted in Washington as RCW 7.04A.130) also requires that in multi-arbitrator cases decisions must reflect the majority's view.

⁹ In cases administered by the AAA under its Commercial Rules, Rule P-2 suggests an agenda for the initial preliminary hearing. *See also* JAMS Comprehensive Arbitration Rule 16, which suggests topics for discussion at the initial preliminary hearing. Regardless of what particular rules suggest for the initial preliminary hearing, the tribunal should discuss and agree on topics to be covered in that initial hearing and circulate a proposed agenda to the parties prior to the conference.

Case and Panel Management

While, for reasons of economy and efficiency, frequently the Chair resolves discovery disputes, the parties should approve any such delegation,¹⁰ normally at the initial preliminary hearing. If the Chair is delegated the authority to resolve discovery disputes, either by rule or party agreement, the Chair should not hesitate to involve the other members of the panel where additional input would result in a more informed decision. Throughout the case, the Chair should lead, not dominate or dictate, discussions on case management issues, ensuring that all panel members have an opportunity to weigh-in on important matters and that case management decisions are the product of consensus among the panel after due inquiry of the parties. Other matters important to case management include the challenges facing a panel with non-lawyer arbitrators,¹¹ interfacing with the provider-organization and, particularly in *ad hoc* arbitrations not administered by a provider-organization, billing issues, dealing with a party's challenge to the continued service of a panel member and replacement of an arbitrator who recuses him- or herself, dies or becomes disabled. Finally, so as to speak with one voice, communications with the parties should – by agreement among the panel members – be handled by the Chair after input from other tribunal members.

Panel Conduct During Hearings

Although it is infrequently the case that panel members engage in inappropriate conduct during a hearing, panelists must be attentive not only to their own conduct but also the conduct of their fellows, particularly in their interaction with the parties, support personnel, counsel and witnesses. Problems must be addressed promptly, professionally, and with discretion. This is generally the province of the Chair, but where the “problem arbitrator” is the Chair, the wings must address the issue. Before asking the parties for additional briefing or witnesses, the need for such should be the product of discussion among the full panel, developing a consensus on whether, when and who (normally the Chair, and without attribution to any member of the panel) should request additional evidence or focused legal briefing.

¹⁰ As noted earlier, in cases administered by the AAA under its Commercial Rules, Rule R-44(b) delegates resolution of discovery disputes to the Chair, absent an objection by a party or another member of the panel.

¹¹ Non-lawyer arbitrators bring a rich diversity of experience, knowledge and professional perspective to panels on which they serve. The panel should, however, be attentive to – and guard against – the problems that differences in experience and perspective can create.

The Deliberative Process

Although many arbitrators share “impressions” or “preliminary views” during the arbitration process (especially during the hearing), arbitrators should keep an open mind throughout. Whether to share such impressions or preliminary views is a subject best discussed by all members of the panel, and the views of all panelists on that subject should be respected. Formal deliberations should only begin when all evidence and legal briefing has been received. Although the Chair is entitled to his or her own views and opinions, the Chair is “one among equals”, particularly during deliberations. While unanimity is desirable (both as to result and, if a reasoned award is to be entered, the reasons as well), it should not trump good faith strongly held views of any panel member; rather, deliberations should be characterized by thoughtful and respectful discussion of panel members’ views of the evidence and applicable legal principles, and differences of opinion explored thoroughly and with an open mind.

Preparation of Orders and Awards

Frequently, routine administrative orders are prepared and entered by the Chair; however, the Chair should consult with other members of the tribunal before issuing them and any order should reflect the view of a majority of the panel.¹² Drafting substantive orders and awards by committee is neither desirable nor necessarily required, but such orders and awards should be the product of thorough discussion by all panel members and the views of all members considered. While it is normally the province of the Chair to draft substantive orders and awards, the Chair should consider the experience and capabilities of his or her fellow panel members before undertaking the drafting process him- or herself; where appropriate, the Chair should not hesitate to assign the initial drafting responsibility to another panel member. Although unanimity is a desirable goal, it is vital that all panel members have an opportunity to express their views – and the rationale for those views – and to feel that they have had that opportunity. Occasionally vigorous and respectful debate fails to yield a unanimous award. However, whether a dissent should be issued – and, if so, what it should say – is something the dissenter should carefully consider, bearing in mind that arbitration awards are not precedential and should mark the end of the dispute...not the beginning of contentious *vacatur* litigation. An intemperate dissent which reflects an *ad hominem* attack on the majority serves no useful purpose and poisons panel interaction when the dissenter and one or more of the majority serve in a future case.

¹² See Rule R-44(a) for cases administered by the AAA under its Commercial Rules, FINRA Rules 12410 (customer cases) and 13414 (industry cases), and Section 13 of the RUAA (adopted in Washington as RCW 7.04A.130). For awards, *accord* JAMS Comprehensive Arbitration Rule 24(b).