An Arbitrator Looks at Expediting the Large, Complex Case

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A "large" case is one that justifies expenditure of a great deal of resources by the parties in order to adequately prepare and present the necessary evidence. A "complex" case, such as a contractual dispute involving design engineering principles, is a factually intricate case that is too complicated to be properly presented on a small scale. Complex cases are occurring more frequently within the court system, especially in the federal courts, and tend to consume enormous quantities of both the system's and the individual litigant's time, energy, and other resources.[1] How would, or should, such cases fare in arbitration? This Article responds to those questions, first by describing a "large, complex case" in which this author was the chair of a board of three arbitrators (the board), and then by discussing some of the lessons learned from that case and from other sources in terms of general approaches to handling such disputes.

I. AN OVERVIEW

The case required extensive amounts of time and energy. It involved claims totalling nearly $800 million, required more than two and one-half years to complete, and consisted of 126 days of hearings in five cities.[2] The board heard sixty-two witnesses and considered the written testimony of several other witnesses whose cross-examination was waived. The record included 30,000 pages of transcript and thirty-six file boxes of exhibits. The cost to the parties of processing the arbitration and re-

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1. This statement of conventional wisdom scarcely needs citational support. Among numerous other sources *see, e.g., Kaufman on ADR*, 5 ALTERNATIVES TO THE HIGH COST OF LITIGATION 198 (Dec. 1987) (quoting Judge Irving R. Kaufman).

2. The hearings included a prehearing conference, a premises inspection, 121 days of oral hearings, and three days of oral argument.

lated litigation has been stated to exceed $30 million. The board issued an award which resolved all the issues between the parties.

Although both parties expressed satisfaction with the outcome of the case,[3] issues were subsequently raised in court about the degree to which the potential liability of a third party might have been affected by the award and about the payability of certain interest. The U.S. District Court entered a judgment confirming the award as issued. At the time of this writing an appeal is pending only on the question of interest.

A prime construction contractor and a utility were the parties in the case, which involved three principal issues: 1) responsibility for the long delay in the completion of a construction project, 2) whether the quality of construction was in compliance with the contract, and 3) the appropriate level of damages, if any.

The delay issues required a detailed examination, on almost a day-by-day basis, of all the relevant construction activities on a significant building project occurring over several years. Questions of responsibility for a number of serious fires and explosions also had to be considered separately and in detail. The dispute about the quality of construction covered numerous pieces of equipment and other aspects of the massive structures in the project. In addition, the quality issues involved highly technical controversies in the fields of metallurgy and fracture mechanics as well as fundamental disputes concerning basic engineering design principles applicable to the types of equipment involved. The damage calculation issues were presented in great depth by both sides in the form of hour-by-hour comparisons of the financial results of actual operation of the power plant over several years with the forecasted results of the plant had it operated as each party claimed it should have.

Subsidiary issues were numerous and complex, including whether the contractor's sureties should be parties to the arbitration and whether the owner's insurance coverage for the project was properly arranged and administered and whether it had an effect upon the liabilities of the parties.

II. The Board of Arbitrators

The selection of the board was a lengthy process, taking more than a year and involving considerable negotiation between the parties as well as the assistance of the American Arbitration Association (AAA).[4] The

3. Arbitration Times, Spring 1989, at 2.

4. Selection of arbitrators is generally a much simpler, more expeditious process, even in instances in which the parties are in serious disagreement. For example, Sections 13 and 14

board was composed of persons whose backgrounds made them familiar with the disciplines involved in the intricate issues in the case. The parties chose this author as chair of the board because of his experience with public utility regulatory ratemaking and power plant construction issues. The parties also chose Mr. Jay G. Halverson, President, Pacific Construction Consultants, Inc., Sacramento, California, because of his expertise in construction engineering and critical path method scheduling techniques, and Mr. Louis J. Rubino, senior partner of Rubino and McGeehin, Bethesda, Maryland, certified public accountants, because of his expertise in construction-related accounting.

The parties agreed that in the event of resignation or disability of any of the arbitrators, the remaining arbitrators would select a replacement who would be permitted to rely upon the written record instead of a repetition of the hearing.

Various procedural issues arising in the course of the proceeding, which was conducted under the Commercial Arbitration Rules of the AAA, may be of interest and are discussed below.

III. The Prehearing Conference

The arbitrators' first knowledge of the nature of the dispute came at a prehearing conference at the AAA's Dallas office. At that conference, the parties described the factual and legal issues as they saw them and stated the initial view that the controversy was largely a "paper case" which could be expeditiously presented. This turned out to be overly optimistic. The board proposed, and the parties agreed upon, a format similar to that used by numerous regulatory agencies whereby direct testimony and exhibits would be prefiled in written form two weeks before each hearing session in order to reduce hearing time and to facilitate preparation for cross-examination. The parties agreed to limit the direct testimony of employee witnesses to one hour each, but not to impose any specific limit on the testimony of outside expert witnesses or on the cross-examination of any witness. The board decided the order of the parties' case presentation and directed the parties to file initial memoranda (lim-

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of the American Arbitration Association's Commercial Arbitration Rules (as amended September 1, 1988) provide for the Association's direct appointment of arbitrators in the event the parties fail to agree. Similar approaches are found in the rules of other appointing agencies. *See, e.g.*, Center for Public Resources, Rules for Non-Administered Arbitration of Business Disputes, Rule 6. Because of the importance of the case in question, however, the Association decided to exhaust the possibility of party agreement before making its own appointments of the arbitrators. The parties were ultimately able to agree.

ited to thirty pages in length) setting out the details of their respective positions. The board did not feel that replies were necessary. The parties were informed that the rules of evidence would not apply (but would have a bearing upon the weight of evidence) and that documents (and copies) would be self-authenticating and presumed genuine if not controverted.

IV. DISCOVERY

Because of the amounts in controversy and the evident importance of the case to both parties, the board determined that it would be liberal in directing discovery. However, because of the parties' indication that this was a "paper" case, and because of a statement by one of the parties that the case could be proved without discovery ("out of the files" of the parties), the board proceeded immediately to schedule the beginning of the hearing itself for a date two months after the date of the prehearing conference, with discovery to be conducted informally in the interim and continued as needed during the aribitration.

As it turned out, discovery efforts over the course of the proceeding proved to be quite extensive on both sides. Demands for discovery were voluminous and detailed and, clearly, compliance involved considerable expense for both parties. Numerous disputes arose concerning discovery; the primary conflicts concerned the attorney-client privilege and attorney work product immunity in connection with the experts' technical reports. While emphasizing that they were not bound thereby, the board relied largely upon the Federal Rules of Civil Procedure and relevant federal court decisions in resolving the disputes.

In some instances, discovery depositions of each sides' witnesses were conducted by agreement of the parties or at the suggestion of the board in order to reduce the likelihood that hearing time would be used for discovery. In one set of depositions, Mr. Rubino, the CPA-arbitrator, presided by agreement of the parties in order to assist the parties in the efficient development of the record on certain accounting issues.[5]

In the final stages of the proceeding, the parties determined that the most efficient way for each side to prepare for cross-examination was to

5. Interrogatories often are the subject of abuse in civil litigation, and in fact, one party in this case employed interrogatories to a relatively limited degree, and consequently, caused controversy. We are in an era where parties serve on the opposing party, word-processor generated copies of enormous questionnaires, which take a generous amount of time and effort to formulate a reply and are often evaded. If properly used, however, they do have the potential to save energies on both sides. An approach involving close supervision by the arbitrator has considerable promise.

depose each upcoming witness after the filing of his written rebuttal or surrebuttal testimony and exhibits, but immediately before the hearing session scheduled for his cross-examination. This approach clearly reduced the hearing time that would have otherwise been required.

Both parties found the need for discovery of information in the possession of third parties, some of whom were quite distant from the principal hearing location. The board agreed to the importance of such discovery and issued subpoenas for third party discovery. In each instance, the subpoena was made returnable at the business premises of the third party. In the event of lack of cooperation on the part of the third party, the board was willing to consider the appropriateness of having one of the arbitrators preside over the third party discovery or, if necessary, of moving the location of the hearing itself temporarily to accommodate the need for the third party's evidence and to obviate any basis for objection to the subpoena. The board was also prepared to direct that the third party be given compensation, if appropriate. In each instance, however, there was complete cooperation by the third party and there was no need for the arbitrators to take any of the foregoing steps.[6]

In several instances the parties requested subpoenas of employees of the other party. In each instance, the arbitrators determined that simply directing the other party to produce the employees was more appropriate. This was done in each instance, with the full cooperation of the producing party.

Both parties prepared much of their technical cases through use of sophisticated computer programs and translated much of the underlying data into an electronic, computer-readable format. Among the significant discovery issues raised in the case were questions of the discoverability of the technical data in this electronic format (which would be more easily analyzed), as opposed to hard copy, and the discoverability of an expert's proprietary computer models for the purpose of critical analysis by the other party's expert (who was a business competitor of the first party's expert). The board directed the production of data in electronic format, including data which was easily utilizable for alternate calculations. The board declined to require payment of compensation because in each instance the data had been accumulated for purposes of the case only and had no further commercial value. With respect to the proprietary computer modeling issue, the board concluded that it would be unfair to require production of programming methodology of commercial value to a competing consultant, but the board stated that the credibility and per-

6. The arbitrators viewed their authority as arising under the Federal Arbitration Act, 9 U.S.C. § 7 (1982) (This Act provides for subpoena power in terms broad enough to cover depositions, if taken in the presence of an arbitrator).

suasive power of the basic presentation would be affected by the expert's unwillingness to permit access to the underlying methodology.

Counsel made several requests for access to the premises in order to inspect some of the equipment at issue. Counsel made other requests for physical examination of materials, including destructive testing. Generally, the board granted the requests and, when appropriate, attached conditions. The board had physically inspected the premises early in the case and as the case progressed, videotape presentations supplemented this inspection.

Counsel also made several requests of the board for in camera inspections of materials involved in discovery disputes. The board denied these requests because of the board's view that an in camera inspection of any material relevant to the merits would be the equivalent of an improper ex parte communication.[7]

V. THE HEARING

The arbitration sessions were held in AAA hearing rooms in Dallas and Boston and in hotel conference rooms in Washington D.C., California, and Louisiana.[8] There was one hearing session each month, and typically, each session lasted five days. However, as the case drew near a close, a four-week hearing session was held to allow one party's complete presentation of its rebuttal case on direct. Cross-examination, except for clarification questions, was deferred. A subsequent two-week hearing session was held to provide continuous cross-examination and redirect.

The entire proceeding (except for the prehearing conference and the premises inspection) was transcribed by a court reporter, with the cost paid directly by the parties. The parties agreed to share the cost of the court reporter, except for the extra cost of transcripts expedited at the request of a party. In the event of such requests, the parties instructed the reporter to provide a copy of the transcript at the same time to both parties, with the total extra cost to be borne by the requesting party. Hard copies of the transcript were provided to the parties, the board, and AAA. In addition, the transcript was maintained on computer disk,

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7. *See* AMERICAN ARBITRATION ASSOCIATION, COMMERCIAL ARBITRATION RULES § 31.

8. Section 11 of the AAA's Commercial Arbitration Rules provides for the AAA's determination of the "locale where the arbitration is to be held" in the event the parties fail to agree. Section 21, however, provides that "[t]he arbitrator shall set the date, time, and place for each hearing." The arbitrators decided that § 21 permitted them to schedule hearing sessions at different places (even those distant from the original "locale") to accommodate the reasonable convenience of a party, while the official "locale" of the case remained the original location.

which, with appropriate conversion, made access to the transcript possible through the use of ordinary word processing programs.

As the proceeding progressed, the board regularly requested the parties to present witness lists describing their plans for the presentation of testimony and estimates of the time involved. The board also requested that the parties make time estimates for cross-examination. These estimates, however, were generally unreliable.

Because of the complexity of the case, the amounts in controversy, and the clear importance of the matter to the parties, the board was reluctant to impose rigid procedural deadlines on the parties. However, the board did require the principal claimant party to complete the filing of its written testimony and exhibits relating to its case-in-chief by a set date. The board did not set a limit on the oral presentation of the direct case, cross-examination, or redirect in each party's case-in-chief. In the final third of the case (the rebuttal and surrebuttal phase), the board did set firm deadlines on the filing of testimony, the oral presentation of direct testimony, the cross-examination, and the redirect. The parties complied with the deadlines as originally set.

The official exhibits in the case filled thirty-six file boxes. These were in the charge of Mr. Halverson, who acted as archivist for the board. The other two arbitrators, however, had their own sets of exhibits and transcripts. The official copy of the transcript was filed with the AAA in Dallas. One arbitrator's copy of the transcript was on computer disk while the other copies were typed. At the conclusion of the case, the parties agreed that the official record would be delivered to the AAA's office in Dallas and would be stored (at the expense of the parties) for one year from the date of the award. After the expiration of a year, the AAA was free to dispose of the materials, in the absence of other arrangements.

VI. The Briefs

The board determined (with the acquiescence of the parties) that the appropriate length of the briefs-in-chief (which were to be filed simultaneously) would be 200 double spaced pages. However, the parties were permitted to accompany their briefs with unlimited appendices and attachments, which could take the form of excerpts from exhibits, transcript pages, charts or other compilations of record information, or any other material referred to in the briefs. The board limited the reply briefs to 100 double spaced pages, again with unlimited appendices and attachments.

Because of the logistical difficulties involved in the board's access to the exhibits (most of which were stored at the hearing site) during the

course of deliberation, the panel specifically requested the parties to include in the appendices and attachments to their briefs copies of the relevant portions of text of any significant record materials to which reference was made. The request also covered cited decisions of courts and regulatory agencies. The brief-in-chief (with appendices, etc.) of one of the parties weighed eighty pounds.

After the filing of the parties' briefs-in-chief, the board asked the parties to submit additional information regarding alternative damage calculation approaches based upon potential alternative decisions by the board on the liability issues.

Because of the size of the documentary record and the frequent need of the parties for the board's assistance in resolving procedural disputes arising between hearing sessions, the board decided early in the case to require the parties to file their documents directly with the board rather than through the AAA's regional office.[9] Documents of moderate length were served on the other party and filed with the board by telefax transmission. Longer documents and testimonial filings were made by overnight express service.

VII. Oral Argument

The board agreed upon the appropriateness of oral argument and arranged a format for three days of oral argument. The time available was broken into subject matter segments and divided equally between the parties. The schedule was followed with relative firmness, except that in those instances in which one party exceeded the time limit by a modest amount, the other party was allowed a compensating increase in time.

After consultation with the parties, the board invited the chief executive officers of each of the parties to attend the oral argument. The board also invited the chief executives to address the board directly, if they wished, as a part of each parties' closing statement. These statements were scheduled so as to permit counsel for each side an opportunity to comment on the statements made by the other side's chief executive. Both chief executives took advantage of the opportunity presented.

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9. In an ordinary case, of course, the AAA's Rules require that submission of all written materials outside the hearing sessions be done through the AAA. *See* American Arbitration Assoc., Commercial Arbitration Rules § 29.

VIII. MISCELLANEOUS

At one point during the proceedings, both parties showed an interest in considering possible bifurcation of liability and damage issues. When the parties proved to be unable to agree on the terms of the bifurcation, the board (with the approval of the parties) proposed approaches, including not only the specification of bifurcated issues, but also procedures for dealing with those issues. Ultimately, however, the parties decided not to proceed with the bifurcation. In retrospect, especially considering the manner in which the specific issues were resolved in the award, the board is of the view that bifurcation would not have significantly reduced either the amount of time in hearing or the total duration of the case, and may indeed have prolonged both.

Several disputes arose over the use of affidavits. Over objection, the board accepted several affidavits, with the caution that the affidavits would have little or no weight in connection with any controverted factual issue.[10] Similarly, the testimony of those witnesses whose direct was presented in person but who became unavailable for cross-examination was accorded little weight.

At one point in the proceeding, after consultation with the parties, the board proposed a format for a settlement discussion between the parties (along the lines of a mini-trial) covering a period of several days. The board made it clear to the parties, however, that such discussions were to be totally private and that the content of the discussions was not to be disclosed in any way to the arbitrators. The parties did conduct the discussions but were not successful in resolving their disputes.[11]

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10. *See* AMERICAN ARBITRATION ASSOCIATION, COMMERCIAL ARBITRATION RULES § 32.

11. Arbitrators are generally discouraged from becoming involved in settlement activities. *See, e.g.*, AMERICAN ARBITRATION ASSOCIATION, COMMERCIAL ARBITRATION RULES § 44 (1988); INTERNATIONAL CHAMBER OF COMMERCE, RULES OF ARBITRATION Art. 17 (1988). The American Arbitration Association has stated:

> The arbitrators should not participate in settlement discussions. If the parties wish to discuss settlement, the arbitrator can be excused from the room. If the arbitrator is a party to settlement discussions or attempts to mediate unsuccessfully, the party may later challenge the impartiality of the arbitrator on that basis.

AMERICAN ARBITRATION ASSOCIATION, A GUIDE FOR COMMERCIAL ARBITRATORS 12 (1985). Almost identical language appears in AMERICAN ARBITRATION ASSOCIATION, GUIDE FOR CONSTRUCTION ARBITRATORS 15-16 (1985).

The board issued the award four weeks after the conclusion of oral argument[12] and included a brief description of the reasons for the board's determinations on each major issue. At the request of one of the parties, the board directed that the award not be released until after the close of the New York Stock Exchange. At 4:00 p.m. on the date of the release of the award, Mr. Helmut O. Wolff, the AAA's Regional Vice President in Dallas, read the operative portions of the award to the parties in a conference telephone call. Immediately thereafter, he telefaxed copies of the complete award to each of the parties, the one receiving the first copy being determined by lot. Subsequently, he sent executed copies by overnight express.

IX. Some Reflections

The great length of the case leads to some natural questions. How would this case have fared in court? If the arbitrators had it to do over, would they have done anything differently? Could the case have reasonably been moved along more quickly? The answers to these questions, which are obviously interrelated, must be speculative, and different participants in the process may respond differently. However, from the viewpoint of the board, the procedure generally worked in the manner intended. While two and one-half years is a long time for resolution of a dispute, the board believes that this enormously complicated controversy would have gone on much longer in the full course of court litigation, with the likelihood of greater discovery activity. Moreover, because of the multitude and complexity of the factual issues in the case, the board is doubtful that a court could have significantly reduced the hearing time

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One court has observed that: "it is better in most cases for arbitrators . . . to avoid discussing settlement. . . ." Ballantine Books, Inc. v. Capital Distrib. Co., 302 F.2d 17, 21 (2d Cir. 1962).

The Code of Ethics prepared for use in commercial arbitration by a joint committee composed of representatives of the American Bar Association and the American Arbitration Association approves a somewhat more flexible approach:

It is not improper for an arbitrator to suggest to the parties that they discuss the possibility of settlement of the case. However, an arbitrator should not be present or otherwise participate in the settlement discussions unless requested to do so by all parties. An arbitrator should not exert pressure on any party to settle.

AMERICAN ARBITRATION ASSOCIATION, CODE OF ETHICS FOR ARBITRATORS IN COMMERCIAL DISPUTES Canon IV.H (1977).

This at least appears to countenance the possibility of a more proactive approach by an arbitrator in situations in which he thinks that such an approach might be productive.

12. Under § 41 of the AAA's Commercial Arbitration Rules the award was required to be issued "no later than thirty days from the date of closing the hearing. . . ." The arbitrators determined that "the closing of the hearing" did not occur until the conclusion of the oral argument.

without significantly impairing the ability of the parties to have their highly technical positions fairly presented.

The fact that the members of the board had professional backgrounds in the disciplines involved in the case undoubtedly reduced the time needed for presentation of the technical testimony of both sides. In addition, the final result in the case was (at least in the view of the board) within the scope of a reasonably expectable outcome, given the practices and customs of the industries and professions involved. A jury trial may or may not have produced a similar result.

The members of the board would not change any significant decision they made in the case, if they had it to do over, but they were not totally satisfied with the general way in which the matter of discovery was conducted. In a typical case, either the parties have little or no need for discovery, or they informally agree to the necessary exchanges, leaving only a few disputes to be resolved by the arbitrators. In the less typical case, extensive discovery requests may be clearly out of line, and can be refused by the arbitrators without hesitation. This case was different in that the amounts in controversy were so large and in that the parties were not willing (for various reasons) to be fully cooperative with each other. The result was that there were numerous discovery disputes (mostly technical ones, not often raising issues of burdensomeness), which impeded the process of efficient discovery. These disputes had to be continuously confronted by the board during and between hearing sessions.

As noted above, because of the size of the case and the importance and complexity of the issues, the board made an early decision to be liberal on the matter of discovery and, therefore, did not place significant restraints on the parties until late in the case. While the board had occasional misgivings, the board believes that in the final analysis, for this particular case, this was the most suitable approach. If discovery had been more restricted, the hearing would have inevitably been prolonged. Furthermore, the board believes that its close supervision of the discovery process, combined with the pressure on the parties resulting from the simultaneous conduct of the hearing and the discovery process, concentrated the parties' efforts and improved their efficiency. The parties may disagree.

X. Expediting the Large, Complex Case

Applying what was learned in this "big" case, we can distill at least some ideas of how to expedite the process without prejudicing the rights of the parties to a fair hearing. We should also keep in mind AAA's

extremely valuable publications on the subject,[13] whose guidance was of great benefit to the arbitrators. The following describes some of the particular approaches.[14]

A. *The Prehearing Conference*

Prehearing conferences are indispensable in large cases. Because hearing procedures in arbitration are not as rigid and prescribed as are court proceedings, it is essential for the arbitrator and the parties to arrive at a mutual understanding of the rules of the game early in the case. All participants need to know how formal the proceeding is going to be, how long it is likely to take, and what particular modes will be followed as the case goes on. The participants should all leave the prehearing conference with a clear understanding of what is expected of them and how the overall case will be presented.

B. *Prehearing Memoranda*

The arbitrators need to have a good idea what the dispute is about as early as possible. Typically, one of the first things discussed at a prehearing conference is the filing of prehearing memoranda by the parties explaining the case and their respective positions on the issues. These memoranda are extremely helpful to the arbitrators as they react to procedural disputes throughout the case and try to organize in their minds the presentations of the parties. Such memoranda would be even more helpful to the arbitrators if they were filed in advance of the prehearing conference. This way the arbitrators' early participation in the consideration of procedural issues can be accomplished with a more comprehensive understanding of each party's position. If the arbitrators do not request prehearing memoranda in advance of the prehearing conference, one or both of the parties should suggest such filings. It would also be quite useful for the arbitrators to have the parties' respective proposals on procedural approaches to the case in advance of the prehearing conference.

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13. *E.g.*, Barrett, *Arbitration of a Complex Commercial Case: Practical Guidelines for Arbitrators and Counsel*, 41 ARB. J. 15 (1986); Poppleton, *The Arbitrator's Role in Expediting the Large and Complex Commercial Case*, 36 ARB. J. 6 (1981). *See also* AMERICAN ARBITRATION ASSOCIATION, GUIDELINES FOR EXPEDITING LARGE, COMPLEX COMMERCIAL ARBITRATIONS (1987).

14. In addition to the sources in the preceding footnote, reference should be made to CENTER FOR PUBLIC RESOURCES, RULES AND COMMENTARY FOR NON-ADMINISTERED ARBITRATION OF BUSINESS DISPUTES (1989).

C. *Bifurcation of Issues*

The typical complex case has difficult liability questions combined with difficult and complex damage calculation issues. In the ordinary case, the claimant's liability case is presented at the same time as the case on damages. The respondent then presents defenses to both categories of issues. A single award typically covers both. In a case in which the arbitrators determine that there is no liability on the part of the respondent, the time and effort expended by both parties on the damages issues will have been expended unnecessarily, at least to the extent that the information developed on damages is not relevant to the liability issues. In such cases, much is to be said for trying the liability issues first and trying the damages issues only in the event the arbitrators determine that the respondent is in some degree liable. Whether a particular case is an appropriate one for bifurcation is a subject which should be explored at the prehearing conference. However, the parties should be aware of the fact that bifurcation (especially in cases in which liability is found) does not necessarily result in a shorter or less expensive proceeding, but may, indeed, have the effect of prolonging the proceeding and making it more expensive. Furthermore, there is often a reluctance on the part of the claimant to agree to bifurcation because of the possible implication that the claimant is uncertain about the merits of his position on liability. Both parties may also be concerned about losing negotiating leverage in the event of an adverse ruling on one or more of the liability issues.

D. *Direct Filing*

Under usual practice, motions, exhibits, and other materials filed by the parties with the arbitrators are submitted to the AAA, which forwards them to the arbitrators, thus eliminating direct contact between the parties and the arbitrators.[15] In the large, complex case, this approach simply does not work. As in the case described above, the better and more expedient approach is to have the parties file their papers directly with the arbitrator, using either telefax or overnight delivery express services, while simultaneously serving copies on the other party. This assumes that the urgency of particular filings justifies the expense. Of course, this is quite similar to the practice that is used, and works quite well, in court and in regulatory tribunals.

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15. *See supra* note 9.

E. *Discovery*

Many people have the impression that there is no discovery in arbitration, and, in the normal arbitration of relatively modest size, that impression is typically correct.[16] Nevertheless, in the large, complex case, discovery is almost inevitable. Only in rare cases will both parties be in full possession of all of the information they need for a full presentation of their positions. Diligent counsel will see to it that the parties get that information, either by some agreed-upon or arbitrator-directed discovery process or, failing that, by protracted cross-examination or obstructive tactics at the hearing itself. The arbitrators must confront the issue of discovery early and squarely with a view toward fair and adequate presentation of each party's case and adequate access to necessary information to make that presentation possible. The selection of arbitration as a dispute resolution mechanism should not have the effect of prejudicing a party's position on the merits by denying him reasonable access to essential information that would have been available to him in a court proceeding. Thus, many believe that particularly in a large and complex case, the arbitrators should establish and enforce an appropriate process for discovery. The arbitrators do, of course, have considerable means to accomplish this, because the power of the arbitrators over the proceeding is generally recognized to be quite broad.[17] Moreover, in most cases the arbitrators have the power to issue subpoenas under applicable state and/or federal law. The power to issue subpoenas can be tailored and used for discovery purposes.[18]

The discovery process is flexible in arbitration. In the case discussed above, the board determined that having discovery conducted simultaneously with the hearing process was appropriate, given the peculiar circumstances of the case. In the more usual case, the discovery would be conducted in advance of the hearing and would be supplemented during the hearing only under particularly exigent circumstances. A perfectly appropriate means of expediting the process would be for the arbitrators (after consultation with the parties at the prehearing conference) to designate a specific time period for the completion of prehearing discovery efforts.

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16. *See* R. RODMAN, COMMERCIAL ARBITRATION WITH FORMS §17.1 (1984).

17. This statement is not without controversy. *See* R. RODMAN, *supra* note 16.

18. While this position makes sense, it is not free from doubt. *See* GENERAL COUNSEL'S ANN. REP., AMERICAN ARBITRATION ASSOCIATION, ARBITRATION AND THE LAW 49 (1984).

F. *Discovery Depositions*

While prehearing discovery depositions are quite unusual (and even unwelcome) in the usual arbitration proceeding, they can be quite useful in the large, complex case and, if judiciously used, can be quite helpful in expediting the process. In the case discussed above, the discovery depositions were helpful in eliminating certain areas of inquiry which would have taken considerable hearing time had the hearing been the only means available for the discovery.

There is also some opportunity, with the cooperation of the arbitrators, for discovery of information in the hands of third parties. If the information is sufficiently necessary for the case, the arbitrators can subpoena the third parties to appear at the hearing. This process can be adapted to result in what amounts to a prehearing third party deposition by use of a subpoena directed to the third party and returnable at his own business location, with attendance of the arbitrator if necessary. Experience shows that parties are often willing to substitute this approach for attendance at the hearing itself, which would perhaps be at a less convenient time and location. Compensation of the third party may be warranted under certain circumstances.

G. *Written Direct Testimony*

Some efficiency can be obtained through the parties' use of written testimony as the means of presenting the direct testimony of their witnesses. When written testimony with accompanying exhibits is presented in advance of hearing sessions, cross-examination can be more effectively prepared (especially in complex, technical disputes) with a consequent reduction in hearing time. While it might seem that the party presenting the testimony loses some advantage of surprise, this is usually not the case, because a surprised cross-examiner of any competence is usually adroit enough to figure out some tactic to gain sufficient additional time to react adequately to the new material. Use of the prepared written testimony submitted in advance simply removes some of the game-playing aspects of the hearing process.

H. *Time Limits*

The matter of the use of time limits is a particularly delicate one. While the courts will certainly uphold arbitrators who set reasonable limits on the presentation of evidence, the courts will set aside awards reached after the arbitrators have unreasonably refused to hear evidence

that, in retrospect, they should have heard.[19] The best and most enforceable time limits are those imposed with the consent and agreement of the parties. The most dangerous are those imposed over the vigorous objection of a party. Time limits should not be imposed arbitrarily or without careful consideration of the objections and the surrounding circumstances.[20]

The matter of time limits is clearly one for consideration at the prehearing conference. Initially, the arbitrators can broach the subject by asking whether the parties would be willing to agree upon a time limit for the duration of the total case, i.e., a due date for the issuance of an award. If such an agreement can be reached, interim deadlines can be determined working back from that final date. If the parties cannot agree, it may be appropriate for the arbitrators themselves to set some kind of deadline for completion of the case and issuance of the award.

Whether or not an overall deadline is set, deadlines or time limits may be appropriate on the presentation of specified segments of the case (e.g., the claimant's case-in-chief) or the presentation of particular direct testimony and/or cross-examination. Such limits can be set in advance or, where appropriate, during the course of the segment or testimony. However, the arbitrators should always be willing to at least consider objections that may arise during the course of the case that previously set deadlines or time limits have become unreasonable or prejudicial because of circumstances.

I. *Self-Authentication of Exhibits*

Business people usually accept documents and other similar material at face value unless there is some reason to view them otherwise. The large, complex case will go more easily if the same approach is taken with respect to exhibits. Indeed, the practice in such cases is to accept copies as if they were originals and to assume that all documents and exhibits are genuine and are what they purport to be unless they are controverted.[21] If a question is raised about the genuineness of a document, that question would be resolved in the usual course, depending

19. For example, § 10 of the Federal Arbitration Act, *supra* note 7, provides that the court may vacate an arbitration award "Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy. . . ."

20. CENTER FOR PUBLIC RESOURCES, RULES FOR NON-ADMINISTERED ARBITRATION OF BUSINESS DISPUTES Rule 9.2 specifically authorizes the arbitration tribunal "to impose time limits it considers reasonable on each phase of the proceeding. . . ."

21. *See* Barrett, *supra* note 13; Poppleton, *supra* note 13.

upon its significance to the case. Similarly, objections based upon the hearsay rule would ordinarily not be encouraged except as a means of emphasizing the lack of persuasiveness of the evidence being presented.

J. *Neutral Experts*

In some large, complex cases, highly technical issues arise which are not within the expertise of the arbitrators. In such cases, it may be appropriate and expeditious for the arbitrators to appoint an independent expert to explore the specific technical dispute and to advise the arbitrators of any conclusions.[22] In such a case, however, the expert's report should not be submitted ex parte, and any communication between the expert and the arbitrators on the merits of the dispute should be done in open hearing with opportunities for the parties to cross-examine and rebut. In the proper case, done in the right way and at the right time, this approach could save considerable hearing time and considerable expense to both parties that would otherwise be incurred for preparation and presentation of competing expert technical testimony.

K. *Exploration of Settlement Possibilities*

Unless the parties ask them to be mediators, the arbitrators should stay out of any settlement discussions between the parties. The arbitrators should also refrain from pressing the parties to settle or to otherwise compromise their positions on the merits. However, there are things that arbitrators can do, and, in some cases, should do, to advance the possibilities of settlement.[23]

Human nature is such that the parties and their counsel are usually reluctant to broach the subject of settlement because of the impression that by so doing they would somehow admit weakness on the merits or lack of appetite for the controversy. Both parties may have clear ideas about settlement possibilities and even a desire to talk settlement, if only the other party will first bring up the subject. In cases like this, the arbitrators can perform a valuable service by raising the subject. They can do this by simply asking the parties whether there have been settlement discussions, or they can go further by asking the parties whether the arbitrators can be of any assistance in designing a format for settlement

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22. This kind of process is specifically authorized in CENTER FOR PUBLIC RESOURCES, RULES FOR THE NON-ADMINISTERED ARBITRATION OF BUSINESS DISPUTES Rule 11.3.

23. *See supra* note 11, for a discussion of the various rules and ethical considerations relevant to this subject.

discussions. In the case described above, the arbitrators did just that by designing a minitrial format for the parties' settlement talks. The parties welcomed this approach, just as they welcomed the opportunity for the chief executives to address the arbitrators at the time of the final oral argument.

At a minimum, the arbitrators should ask the parties whether settlement discussions have been conducted and, if the answer is in the negative, to request that the parties meet (obviously without the arbitrators) to discuss whether settlement is possible.

L. *Conduct of the Hearing*

In all cases, the arbitrators must take firm charge of the hearing itself to assure that it proceeds fairly, predictably, and in a reasonably expedited fashion. When appropriate, the arbitrators should clearly express their concern about the progress of the case. The arbitrators should adhere to the schedules and should encourage the parties to present evidence succinctly and in an organized manner. Rambling, repetitive, immaterial, and cumulative evidence should all be discouraged. Hearing sessions should start on time; breaks and recesses should not be permitted to extend for excessive periods. Evening and weekend sessions should be used when they would make sense. However, unduly long hearing sessions should be avoided where they show signs of being unproductive.

The large, complex case presents another set of problems. In the large, complex case the parties are typically represented by competent, even extraordinary counsel. Consequently, the procedural issues that arise during the hearing are likely to be much more subtle and difficult to deal with than in the garden variety case. Furthermore, egregious lapses in procedural requirements are rarely encountered and the presentations made will tend to be well-organized and of considerable persuasiveness. In this setting, the arbitrators must be especially cautious about excluding evidence, even when the objections on their face seem appealing, because one of the few things courts will fault arbitrators for is the refusal to hear evidence which appears to be material to the case.[24] Large cases are very expensive to prepare and to present. If a party is willing to go to the expense of preparing and presenting particular items of evidence, the arbitrators should be willing to at least listen to those items (so long as the evidence does not take too long or result in demonstrable and improper injury to the other party) even though the evidence might involve hearsay, repetition, or other evidence inadmissible in court. One of the

24. *See supra* note 18.

less attractive features of courtroom litigation is that arguments over the admissibility of minor items of evidence often take significantly longer to resolve (and are more disruptive of the trier of fact's attention span) than the actual presentation of the evidence. Arbitrators in large cases are quite able to take questions of admissibility into account in weighing the evidence; they do not need to be cavalier in sustaining objections (even if well taken, from a courtroom point of view) to maintain control of the hearing. Of course, this is not to say that the arbitrators should not react if the hearing is unduly prolonged or is significantly and adversely affected by presentation of poorly grounded evidence, but rather that they should proceed very cautiously when using exclusion of evidence to control the hearing.

XI. Conclusion

The large, complex arbitration case presents a real challenge for expedition. The parties and their counsel are usually accustomed to the slow and lumbering process of courtroom litigation and pretrial discovery practice and find it difficult to adapt to the different circumstances of the arbitral process. A determined approach on the part of the arbitrator, with the cooperation of the parties and their counsel, can produce an effective and fair dispute resolution process. This can be accomplished through diligent use of the prehearing conference, judicious use of tailored discovery procedures, and efficient hearing procedures.