Bennett ADR

My Approach to Arbitration

Arbitration is a collaborative alternative dispute resolution mechanism in which the Parties, their Counsel, and the Arbitrator work together to achieve an efficient, economical, and judicious resolution of a dispute. When approached with this mindset, Arbitration is a cost-effective alternative to litigation.

The Arbitration process works best when the parties are confident of the neutrality of the Arbitrator. Early in the Arbitration, the Parties provide me with the names and addresses of persons and organizations who are or might be involved with the dispute. This information allows me to check for relationships that should be disclosed to the Parties.

The Case Management Conference occurs shortly after the Arbitration demand is filed. During the conference, we discuss procedures that will govern the Arbitration. The goal is to develop a mutually acceptable schedule and process. After the conference, a Case Management Order embodying the agreed upon schedule and procedures is issued.

Parties regularly need discovery to prepare their cases properly. The challenge is to keep that discovery focused, and avoid having it morph into expensive, litigation-style discovery. The parties may engage in mutually acceptable discovery. If a disagreement arises, we work to identify the evidence essential to the fair presentation of claims and defenses, and the most efficient way to obtain it.

Parties make robust initial disclosures to streamline discovery. If experts are to be called, the Parties exchange comprehensive reports addressing the substance of the expert's direct testimony. Additional expert discovery may proceed upon agreement of the Parties or Order issued for good cause shown.

Parties are required to bring discovery disputes to my attention quickly. Brief letters outlining the dispute are submitted, and a telephone conference takes place during which we work to resolve the dispute. For discovery disputes during depositions, parties are to call me from the deposition, so we can address and resolve the dispute immediately. In each dispute, the Parties are encouraged to focus on what is essential to the fair presentation of their cases, and how the desired evidence can be obtained most efficiently. My goal is to resolve discovery disputes by agreement. If this is impossible, leave will be granted to file a formal discovery motion.

E-discovery presents its own set of challenges. Parties cannot be denied access to evidence simply because it is in electronic format. Unfortunately, Parties frequently do not possess the technical ability to access and produce such evidence without expensive, outside expert support. We work to resolve E-discovery disputes as efficiently and economically as possible. When necessary, a proportionality analysis will be conducted to determine whether the value of the proposed E-discovery is outweighed by its cost. Cost shifting will also be considered where appropriate.

Sometimes Parties want to engage in dispositive motion practice. Such motions add a layer of expense that can be substantial. More important, if a dispositive motion is granted, the Party opposing the motion may try to challenge the Award by arguing the Arbitrator improperly refused to hear pertinent and material evidence. While such challenges normally fail, an Award granting a dispositive motion must be prepared carefully so a reviewing Court will understand why it was issued, and why it does not constitute an improper refusal to hear pertinent and material evidence. While a dispositive motion date is set in the Case Management Order, I encourage the parties to consider these issues before preparing and filing such a motion.

The desire to proceed in a fair, efficient, and economical manner carries over to the final hearing.

The Parties exchange their final witness lists at least one week before the final hearing, with brief summaries of the witnesses' anticipated testimony. They exchange their final exhibit lists and copies of their exhibits at the same time. The parties also submit short pre-hearing briefs outlining their arguments and providing copies of their authorities.

Generally, the final hearing flows like a court trial. The Parties give opening statements. Claimant puts on their case in chief, followed by Respondent. Rebuttal testimony is allowed until both sides are satisfied with the record and confirm they have no additional evidence to present.

If a witness cannot attend a hearing in person, Parties may present their testimony electronically via telephone or video conference. Witnesses may also be taken out of sequence when doing so is the most efficient way to proceed. Since the improper exclusion of material and pertinent evidence is one of the bases for challenging an Award, Parties are accorded substantial leeway when offering evidence. When an objection is asserted, the normal test is not whether the proposed testimony violates a Rule of Evidence, but whether the objecting Party is unfairly prejudiced by the proposed evidence. The Rules of Evidence are considered when determining the weight to be accorded the testimony.

At the conclusion of the testimony, the Parties make closing arguments discussing the facts and law of the dispute. After

closing arguments, we discuss whether post-hearing briefs are needed and, if so, the topics they will address.

The final Award is prepared after these procedures are complete. The form of the Award is specified in the Case Management Order. Normally the Award will be a reasoned Award that explains how the judgment was reached but does not include formal findings of fact and conclusions of law. (Formal findings of fact and conclusions of law can be provided if requested.) With the issuance of the final Award, my involvement in the case terminates, except for the correction of clerical, typographical, or computational errors in the Award.

Marshall A. Bennett, Jr.
Marshall & Melhorn, LLC
Four SeaGate, Eighth Floor
Toledo, Ohio 43604
(419) 249-7127
Facsimile (419) 249-7102
Mobile (419) 367-7127
bennett@marshallmelhorn.com
vCard

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